No. 15811

In the United States Court of Appeals

For the Ninth Circuit

MONTE G. MASON,
Appellant,
vs.
ERNEST UTLEY, Trustee in Bankruptcy of the Estate of Monte G. Mason, Also Known as M. G. Mason,
Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division

Appellant's Opening Brief

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CR 6-8257; BR 2-1964
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JURISDICTION

A petition in involuntary bankruptcy naming appellant as the alleged Bankrupt was filed on December 27, 1956, (R. 3-8),[1] and an Amended Petition in Involuntary Bankruptcy was filed on March 11, 1957, (R. 9-15), containing, among other things, certain alleged acts of bankruptcy by petitioner.

On April 2nd, 1957, a Notice of Motion to Dismiss the Petition and for a More Definite Statement was filed on behalf of appellant by his then attorney, Law-

[1]The reference preceded by the letter "r" are to the Transcript of Record on Appeal.

rence J. Rittenband (R. 16-7), supported by a Memorandum of Points and Authorities. (R. 17-18).

After hearing, the Referee in Bankruptcy issued his order on Motion to Dismiss, wherein he in part ruled that Paragraph *IV-A* of the Amended Petition (see above) stated a valid act of bankruptcy, and reserved ruling as to whether Paragraph IV-B of said Petition stated a valid act of bankruptcy (R. 18-19). Notice of said ruling was filed on April 23rd, 1957 (R. 19-20) and on May 20, 1957, the adjudication of Bankruptcy against appellant was entered.

On May 23, 1957, appellant, by his then attorney, Lawrence J. Rittenband, filed a Notice of Motion to set aside the Adjudication of Bankruptcy (R. 22-23) together with an Answer to the Amended Involuntary Bankruptcy Petition (R. 20-22), and his Affidavit as to the reasons for his failure to file said Answer sooner (R. 23-26).

On June 18, 1957, a hearing upon said Motion was held before the Referee in Bankruptcy (R. 27-49), and on June 26, 1957, said Motion to Set Aside the Adjudication in Bankruptcy was denied (R. 49-50).

On July 2, 1957, appellant's present attorney was substituted in lieu of his prior attorney (R. 51).

Thereafter, on July 3, 1957 a Petition for Review was sent to the Clerk of the Court, and on July 23, 1957, a Supplemental Petition for Review was filed in the within matter (R. 52-56), a hearing thereon was

held (R. 57-71), and the Referee certified the matter for review to the United States District Court (R. 71-77).

On November 15, 1957, the United States District Court entered *nunc pro tunc,* its Order in this matter (R. 78-79), confirming the Referee's denial of the Motion to Set Aside Adjudication of June 26, 1957 and the Adjudication of May 20, 1957, and holding that the Amended Petition stated an act of Bankrutpcy within the meaning of Section 3 A (1) of the Bankruptcy Act (11 U.S.C. Section 21(a)(1) (1952) (R. 78-79).

Notice of Appeal was filed on November 25th, 1957.

THE STATUTE INVOLVED

The Statute involved in this case is 11 U.S.C. Section 21 (a) (1) and Section 1 (22).

Section 21 (a) (1) provides:

> (a) Acts of Bankruptcy by a person shall consist of his having (1) concealed, removed or permitted to be concealed or removed any part of his property, with intent to hinder, delay, or defraud his creditors or any of them, or made or suffered a transfer of any of his property, fraudulent under the provisions of Section 107 or 110 of this title. . . .

Section 1 (22) provides:

> (22) Conceal shall include secrete, falsify and mutilate.

STATEMENT ON POINTS OF APPEAL

A concise treatment of the points upon which Appellant intends to rely in this appeal are as follows:

I. That the District Court erred in confirming the Adjudication of Bankruptcy against appellant in that the Involuntary Petition and Amended Petition do not state any legally cognizable acts of bankruptcy; that the adjudication of the bankruptcy herein is illegal and contrary to the law.

II. That the District Court erred in sustaining the refusal of the Referee in Bankruptcy to vacate the adjudication in bankruptcy and to permit appellant to file an Answer to the Petition and Amended Petition, to have a trial by jury, and to a hearing on the merits.

DISCUSSION

I.

THE DISTRICT COURT ERRED IN CONFIRMING THE ADJUDICATION OF BANKRUPTCY AGAINST APPELLANT.

The District Court erred in confirming the Adjudication of Bankruptcy against Appellant, because the alleged acts of bankruptcy alleged in the Amended Petition which he found to be such alleged acts as are stated in Paragraph IV-A of the Amended Petition, are not in law properly acts of bankruptcy.

All that said paragraph IV-A alleges is that Petitioner was examined in a State Court proceeding, that in substance he testified that he had no property, and that he thereby concealed certain alleged interests in a house, an oil well and other items. (R. 11-12).

It is basic law that the Court has no jurisdiction to promulgate an Adjudication of Bankruptcy where the Petition fails to plead one or more acts of bankruptcy cognizable under the Bankrupt Act.

See, e.g., *In Re D. F. Herlehy Co.,* 247 Fed. 369;
In re Schwartz, 9 Fed. Supp. 89, App. Dism. 76 Fed. 2d, 863;
In re Diamond Fuel Co., 283 Fed. 108; cert. den. Sub nom Canute;
S. S. Co. vs. Philadelphia and West Virginia Coal Co., 43 S. Ct. 89 Affirmed S. Ct. 67;
In re Gayner Homes, 65 Fed. 2d. 378.

Here Paragraph IV-A merely states that Petitioner allegedly testified falsely in a *State proceeding,* not that he concealed anything from the Bankrupt Court, and not that there was anything in fact concealed, as distinguished from mere testimony about it.

It is respectfully submitted that htere is no act of bankruptcy included in The Bankruptcy Act consisting of *false testimony concerning* past or present activities or facts.

The concealment of property enumerated in the Code as an act of bankruptcy means an actual, physi-

cal concealment of property, and not false testimony concerning the property.

See, e.g. *Continental Bank & Trust Co. vs. Winter,* 153 Fed. 2d 397;
In re Wilmington Hosiery Co., 120 Fed. 180;
In re Filer, 108 Fed. 209;
In re Shoesmith, 135 Fed. 684.

Moreover, allegations of acts of bankruptcy must be based on something more than hearsay, rumors or suspicion.

In re Blumberg, 133 Fed. 845;
In re McGraw, 254 Fed. 442;
In re Guaranty Building & Loan Association, 49 Fed. 2d, 776;
In re O'Neil, 266 Fed. 530;
In re Hollywood Land & Water Co., 41 Fed. 2d, 778.

In the *Continental Bank* case, *supra,* the Court in part stated:

> "Property is concealed or permitted to be concealed within the meaning of those terms in the definition of the first act of bankruptcy in paragraph 3, sub. a, when a person does, or permits to be done, anything with intent to hinder, delay or defraud his creditors which prevents, or tends to prevent the discovery of the property. Proof of concealment, however, requires something more than a mere failure to volunteer information to

creditors. *In re Shoesmith,* 7 Cir. 135 F. 684. It follows that neither the failure of the appellee to notify the appellant that she had executed the waiver nor her failure to keep control or possession of it were acts of bankruptcy and that the only possible act of bankruptcy alleged in the proposed amendment was a transfer perfected more than four months before the involuntary petition was filed." (153 Fed. 2d., at page .....).

Allegations in words of the Statute of acts of bankruptcy, are insufficient.

See, e.g., *In re Sumberes,* 254 Fed. 442;
Meek vs. Beezer, 28 Fed. 2d 343, cert. den. 49 S. Ct. 177.

An alleged act of bankruptcy in the payment of certain sums to the Probation Department of Los Angeles County under the order of restitution made by the Superior Court is not an act of bankruptcy.

Cf., *Park Lane Dresses, Inc. vs. Houghton,* 54 Fed. 2d. 33.

It is obviously not made, and it is not alleged in the petition that it was made, "with intent to hinder, delay or defraud his creditors or any of them" and plainly does not constitute the making or suffering the transfer of any of his property fraudulently under the provisions of the Bankruptcy Act.

It is patent, also, that the statement in the petition as to alleged acts of bankruptcy "presently unknown," does not constitute an allegation of an act of bankruptcy.

Moreover, the *facts* relied upon to establish concealment must be set forth in the petition fully, and specific facts concerning the particular disposition must be alleged.

See, e.g., *Providence Box & Lumber Co. vs. Goodrich Daniell Lumber Corp.,* 80 Fed. Supp. 61;

In re Heltman-Thompson Co., 83 Fed. Supp. 156;

Matter of Myers, 31 Fed. Supp. 636;

In re Rosenblatt & Co., 193 Fed. 638;

In re Condon, 209 Fed. 800;

Matter of Morosco Holding Co., 296 Fed. 516;

Conway vs. German, 166 Fed. 67.

II.

THE DISTRICT COURT ERRED IN SUSTAINING THE REFUSAL OF THE REFEREE IN BANKRUPTCY TO VACATE THE ADJUDICATION IN BANKRUPTCY, TO PERMIT APPELLANT TO FILE AN ANSWER TO THE PETITION AND AMENDED PETITION, TO A TRIAL BY JURY, AND TO A HEARING ON THE MERITS.

The Referee erred in refusing to set aside the adjudication of bankruptcy and in denying to Petitioner the right to file an Answer and for a trial upon the issues created thereby.

In view of the expanded powers vested in Referees in Bankruptcy under Section 38 of the Amendment to the Bankruptcy Act in 1938, the Referees in Bankruptcy clearly have the power to vacate an adjudication or dismiss petitions in bankruptcy and have all of the attendant powers incidental thereto.

As stated in Collier on Bankruptcy (14th Ed.) Vol. 2, p. 1400:

> "In all cases where the Referee is empowered to make the adjudication, it appears that he may thereafter vacate such adjudication and dismiss the proceedings."

That question has been settled by the Supreme Court in *Pfister vs. Northern Illinois Finance Corp.*, (1942), 317 U.S. 144, 63 S. Ct. 133.

In the Matter of Pottasch Bros. Co., Inc., (C.C.A. 2d Cir.) 79 Fed. 2d, 613, Circuit Judge Learned Hand, after reviewing all of the authorities, concluded that the Referee had the same power as any other Court to reconsider and amend his orders, despite the fact that such orders were reviewable by the District Judge.

Under the Rules of Federal Practice, which covers bankruptcy proceedings, except as insofar as they were inconsistent with the Bankruptcy Act or with General Orders, the rule is that a Motion To Set Aside a default judgment in order that the case may be tried upon the merits *is to be literally construed,* more particularly where the adjudication was the result of mistake, inadvertence or excusable neglect.

See, e.g., *Kuntz vs. Young,* (C.C.A. 8th Cir.), 131 Fed. 719;

Kruell vs. N. Y. Ambassador, Inc., (C.C.A. 2d, 1939), 108 Fed. 2d, 294;

Kwasimur vs. Cardillo, (C.C.A. 3rd, 1949), 175 Fed. 235;

In re Grand, (C.C.A. 3rd, 1946), 153 Fed. 2d 1001;

Gerber vs. Frushter, (C.C.A. 2d 1945), 145 Fed. 2d 120.

Here the facts clearly show that Petitioner at all times objected to being declared a bankrupt, and sought to challenge the allegations of the Petition filed against him. Through the mistake, inadvertence and

excusable neglect of his then lawyer, petitioner has been deprived of his right to file an Answer (R. .....) to the Amended Petition and of his right to a trial upon the merits.

Plainly it is only in a most extreme case of disregard for procedural legal requirements, of deliberate attempt to misuse the processes of a Court—none of which are present here—that any party should be denied his day in Court and to a full and fair hearing on all issues.

CONCLUSION

The amended petition fails to state an act of bankruptcy under the Bankruptcy Act. The Bankruptcy Court did not acquire jurisdiction in this matter. The adjudication of bankruptcy should be vacated, and the amended petition dismissed, or in the alternative, Petitioner's Answer should be accepted, and he be accorded his day in Court and a hearing upon the issues preserved by the Amended Petition as denied by the Answer.

Respectfully submitted,

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Attorney for Petitioner.